SUPREME COURT, U.S.
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No. 94-446

In The
Supreme Court of the United States
October Term, 1994

CITY OF CORVALLIS,

Petitioner

v.

JENNIFER C. TURPEN and
DONALD LEE THOMAS,

Respondents.

On Petition for Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a tenant's right under state landlord-tenant law to seek an injunction against a landlord who failed to pay for water service constitutes a constitutionally protected "property interest" under the due process clause of the fourteenth amendment when a city destroys the tenant's ability to pursue the injunctive action by terminating the tenant's water service without prior notification.

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Respondents Jennifer C. Turpen and Donald Lee Thomas respectfully request that this Court deny the Writ of Certiorari sought by Petitioner City of Corvallis.

I.

STATEMENT OF THE CASE

The City of Corvallis disconnected water service to Jennifer Turpen and Donald Thomas (the "Tenants") twice

in 1990 without giving them prior notice. The City turned off the water because the landlord failed to pay the bill. The City's official policy was to notify only the bill payor without providing any notice to the residence where water service would be disconnected.

The Tenants raised two constitutional theories to the federal district court in a 42 USC § 1983 action: 1) the Tenants had a property interest under the due process clause in the form of a cause of action against their landlord for injunctive relief under state landlord-tenant law; and 2) the Tenants had a property interest in their entitlement to continued water service. The District Court ruled in favor of the Tenants on the first argument and rejected the second argument. On appeal, the Tenants raised both arguments again. The Ninth Circuit affirmed the District Court's ruling regarding the first argument, and refused to rule regarding the second argument, holding that the issue was not properly before them because the Tenants failed to file a cross appeal.

In its Petition for Writ of Certiorari, pages 4-6, the City outlines a series of facts which are neither relevant nor established in the record. The Tenants never stipulated to the correctness of any facts contained in the Affidavit of Mark Larson, cited at length by the City.

This laborious recitation of misleading and immaterial facts is grounds alone to deny the City's petition under Supreme Court Rule 14 .5.

II.

ARGUMENT

REASONS FOR DENYING WRIT

A. Supreme Court Review Of This Case Is Inappropriate As There Is No Conflict Among The Circuits.

There are only two circuits that have considered the question presented: the Ninth and the Eleventh. In the instant case, the Ninth Circuit relied extensively on the Eleventh Circuit's decision of DiMassimo v. City of Clearwater, 805 F.2d 1536 (11th Cir. 1986). In fact, the court stated that DiMassimo is a "virtually identical case." Turpen v. City of Corvallis, 26 F.3d 978, 979 (9th Cir. 1994). Contrary to the City's assertions, Sterling v. Village of Maywood, 579 F.2d 1350 (7th Cir. 1978) is inapposite. In that case, the Seventh Circuit did not even discuss whether a tenant's state law cause of action against a landlord is a constitutionally protected property interest. In Sterling, the tenants only argued that they had a

property interest in continued water service (an argument the district court likewise rejected in this case). Accordingly, the Seventh Circuit expressed no opinion regarding the issue ruled upon by the Ninth Circuit. To argue that Sterling and this case are "on all fours" and "in direct conflict" is a reckless misstatement of law.

As there have been no inconsistent court rulings on the issue presented, and the issue is uncomplicated and rarely litigated, there is no need for Supreme Court guidance in this area of law.

B. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition.

All five of the questions presented by the City rely on misstatements of law or fact and attempt to present legal arguments that were not raised at the Ninth Circuit. Because the questions presented by the City rely on arguments that were not considered below, they cannot properly be raised before this Court. Delta Airlines v. August, 450 U.S. 346, 362 (1981). For this reason alone, the Court should deny the writ.

i. The City never argued below that the tenants' right to sue for an injunction arises only after the water has been shut off.

Underlying questions 1-4 of the Petition is the City's assertion that under Oregon law, a tenant can bring an injunction only after the landlord has disconnected the water service. The City's attempt to distinguish Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (pages 23-25 of the Petition) is also based on this misstatement of law. The City never argued this position below and in fact took the opposite stance in its Ninth Circuit brief, where at page 15, it stated, ". . .it is clear that the right to obtain an injunction exists both before and after the alleged violation of the rental agreement or ORS 90.320."

Further, a plain reading of Oregon law shows the City's argument to be specious. Under Oregon law, a landlord is required to maintain a dwelling in a habitable condition "at all times" during the tenancy. Oregon Landlord and Tenant Act, Or.Rev.Stat. § 90.320(1). The City does not dispute that failure to supply water violates this statute. The Ninth Circuit correctly held in this case that "[u]se of the premises without interruption of water services can be secured only by an action for injunctive

relief before that interruption occurs." 26 F.3d at 979 (emphasis added).

ii. The City never argued below that due process would require the City to delay terminating water service until after the Tenants received state court relief.

In question 5 and section 2. of its Petition, the City presents another novel departure from its previous arguments. The City attempts, for the first time, to portray the due process required in this case as not only notice, but also, time for the Tenants to hire an attorney and to have a hearing in state court on their claim for an injunction. There has never been the slightest suggestion by either party during the course of this litigation that the City would have to wait until the Tenants had their day in court before shutting off water service. All the Tenants are asking for in this case is that they receive prior notice of a scheduled water shut off.

The City's argument fails not only because it was not presented below, but more importantly, because it is irrelevant to this case. As stated by the Ninth Circuit in its decision, the issue presented before the Court is whether a due process right exists, not what process is due.

Even if we were to assume that the level of due process were relevant, the City's argument outlined in pages 18-20 of its Petition is so far afield that it borders on the ridiculous.

The City asserts that notice alone would have been meaningless to the Tenants because the water service may have been terminated anyway before the Tenants received state court relief. With prior warning, the Tenants not only could have sought legal assistance, but in addition, they could have taken steps to prepare for the shut offs, such as securing alternative living arrangements or stockpiling water. Even if ultimately they had been unsuccessful in getting the landlord to pay the water bill before the shut offs occurred, they still would have had time to prepare for the shut offs and would have received the opportunity to seek relief in state court. As such, to claim that prior notice of a shut off is "meaningless" unless a tenant also achieves state court relief is nonsense.

In sum, this Court should deny the writ because all of the questions presented by the City rely on arguments that were not raised before the Ninth Circuit. As such, they cannot properly be raised before this Court.

C. The Ninth Circuit Correctly Held That Post-Deprivation Remedies Are Inadequate In This Case.

The City asserts that "there simply is no practical way that the City of Corvallis can provide proper notice to tenants" unless the City takes on the "extreme and expensive burden" of finding out the names of all tenants. The City claims that a notice addressed to "occupant" would provide no due process "at all," and therefore under Parratt v. Taylor, 451 U.S. 527 (1981), post-deprivation remedies are sufficient.

Both the District Court and the Ninth Circuit flatly rejected this argument. First, under Parratt, post-deprivation remedies are only adequate when the deprivation results from a "random and unauthorized" act. In the case at bar, of course, failing to notify the Tenants was not a "random and unauthorized" act, but instead was the result of the City's official policy. Second, the City can simply provide a door-hanger notice and send a letter addressed to "occupant" to the service address to fulfill its due process obligations. These notices can be accomplished without knowing the names of the occupants and without much administrative burden or expense.

The national impact of letting the Ninth Circuit

Court of Appeals' decision stand on the question presented is to protect the rights of those facing unexpected and potentially health-threatening water shut offs at very little administrative burden and expense to the municipalities.

III.

CONCLUSION

The Ninth Circuit's decision is neither novel nor unusual. It is completely consistent with the only other reported decision on the same issue and is merely a straightforward application of Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). There is no need for Supreme Court guidance in this area of law, and in fact it would be improper for the Court to accept review because all of the questions framed by the City rely on arguments that were not considered below. The Petition for Certiorari should be denied.

DATED: September 29, 1994

Respectfully submitted,

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